NO. 55795-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMIE WALLIN,

Respondent

WASHINGTON DEPARTMENT OF CORRECTIONS,

Appellant.

DEPARTMENT'S REPLY BRIEF AND RESPONSE TO CROSS APPEAL

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 3

III. ARGUMENT 7

A. All of the Requested Records Were Contained in the SOTP Patient Files 7

B. Because Wallin Requested Patient Records from a Health Care Provider, the UHCIA Provides the Exclusive Mechanism for Obtaining These Records 10

1. Prior Case Law Did Not Resolve This Question Because the Issue Was Never Addressed in Those Opinions 12

2. The Other Authorities Cited by Wallin Do Not Undermine This Conclusion 21

3. Wallin's Belated Attempts to Question Whether the UHCIA Applies to These Records Are Unpersuasive 26

C. The Patient Files Were, in the Alternative, Categorically Exempt under the PRA, and the Department Properly Raised That Argument Below 31

1. The Department Did Not Waive This Argument 32

2. Even if the UHCIA Is Not the Exclusive Mechanism for Obtaining These Records, They Are Nonetheless Categorically Exempt under the PRA 37

D. The Court Should Decline to Consider Wallin's New Evidence and Unpreserved Argument That SOTP Patients Waive Confidentiality 43

E. The Superior Court Properly Exercised Its Discretion in Denying Wallin's Motion to Stay the Penalty Phase to Allow for Additional Discovery 46

F. The Superior Court Correctly Denied Wallin Penalties Because He Failed to Show the Department Denied Him Records in Bad Faith 48

G. The Superior Court Did Not Abuse Its Discretion in Reducing Wallin's Costs and Ordering the Amount to Be Paid Into His Trust Account 52

1. The Superior Court Did Not Abuse Its Discretion in Reducing Wallin's Costs 53

2. The Superior Court Did Not Abuse Its Discretion in Rejecting Wallin's Attempt to Circumvent Statutory Deductions 57

H. Wallin Is Not Entitled to Costs on Appeal 60

IV. CONCLUSION 61

V. CERTIFICATION 62

TABLE OF AUTHORITIES

Cases

Adams v. Wash. State Dep't of Corr.,
189 Wn. App. 925, 361 P.3d 749 (2015) 49

American Civil Liberties Union of Wash. v. Blaine School District No. 533,
95 Wn. App. 106, 975 P.2d 536 (1999) 53

Bainbridge Island Police Guild v. City of Puyallup,
172 Wn.2d 398, 259 P.3d 190 (2011) 39, 40

City of Lakewood v. Koenig,
160 Wn. App. 883, 250 P.3d 113 (2011) 61

Cont'l Mut. Savings Bank v. Elliot,
166 Wn. 283, 6 P.2d 638 (1932) 12, 15

Crosswhite v. Wash. State Dep't of Soc. & Health Servs.,
197 Wn. App. 539, 389 P.3d 731 (2017) 16

Eggleston v. Asotin Cnty.,
No. 34340-5-III, 2017 WL 6388976, 1 Wn. App. 2d 1045 (2017) 53

Faulkner v. Wash. Dep't of Corr.,
183 Wn. App. 93, 332 P.3d 1136 (2014) 49

Francis v. Wash. State Dep't of Corr.,
178 Wn. App. 42, 313 P.3d 457 (2013) 49

Gander v. Yeager,
167 Wn. App. 638, 282 P.3d 1100 (2012) 54

John Doe G. v. Dep't of Corr.,
190 Wn.2d 185, 410 P.3d 1156 (2018) 28

John Doe G. v. Dep't of Corr.,
197 Wn. App. 609, 391 P.3d 496 (2017), *rev'd*, 190 Wn.2d 185,
410 P.3d 1156 (2018) 16. 27, 28

John Doe P. v. Thurston Cnty.,
199 Wn. App. 280, 399 P.3d 1195 (2017), *review granted and remanded*, 190 Wn.2d 1018, 418 P.3d 796 (2018) 16

Kanam v. Kmet,
21 Wn. App. 2d 902, 508 P.3d 1071 (2022) 60

King Cnty. v. Sheehan,
114 Wn. App. 325, 57 P.3d 307 (2002) 49

Koenig v. City of Des Moines,
158 Wn.2d 173, 142 P.3d 162 (2006) 39

Kozol v. Wash. State Dep't of Corr.,
192 Wn. App. 1, 366 P.3d 933 (2015) 46

Lancaster v. Wash. State Dep't of Corr.,
No. 48708-0-II, 2018 WL 5277954, Wn. App. 2d 1048 (2018) 48

Lee v. City of Seattle,
No. 75815-2-I, 2018 WL 2203287, 3 Wn. App. 2d 1055 (2018) 16

Mitchell v. Wash. State Institute of Public Policy,
153 Wn. App. 803, 225 P.3d 280 (2009) ..... passim

Newman v. King Cnty.,
133 Wn.2d 565, 947 P.2d 712 (1997) 40

Oliver v. Harborview Medical Center,
94 Wn.2d 559, 618 P.2d 76 (1980) 14

Osborn v. *Pub. Hosp. Dist. I, Grant Cnty.*,
80 Wn. 2d 201, 492 P.2d 1025 (1972) 35

Prison Legal News v. Department of Corrections,
154 Wn.2d 628, 115 P.3d 316 (2005) 17, 18, 19, 51

Resident Action Council v. Seattle Housing Authority,
177 Wn.2d 417, 327 P.3d 600, 606 (2013) 41

Resident Action Council v. Seattle Housing Authority,
300 P.3d 376, (2013)
amended by Resident Action Council v. Seattle Housing Authority,
177 Wn.2d 417, 327 P.3d 600 (2013) 18

Sanders v. State,
169 Wn.2d 827, 240 P.3d 120 (2010) ..... passim

SEIU Healthcare 775NW v. State, DSHS,
193 Wn. App. 377, 377 P.3d 214 (2016) 40

Simpson v. Okanogan Cnty.,
No. 28966-4-III, 2011 WL 1549230, 161 Wn. App. 1025 (2011) 16

Smith v. Okanogan Cnty.,
100 Wn. App. 7, 994 P.2d 857 (2000) 61

State v. Kirkman,
159 Wn.2d 918, 155 P.3d 125 (2007) 32

State v. Parris,
163 Wn. App. 110, 259 P.3d 331 (2011) 42

State v. Ziegler,
114 Wn.2d 533, 789 P.2d 79 (1990) 44

Wash. State Dep't of Trans. v. Mendoza de Sugiyama,
182 Wn. App. 588, 330 P.3d 209 (2014) 53

West v. Department of Licensing,
182 Wn. App. 500, 331 P.3d 72 (2014) 40

Wright v. State,
176 Wn. App. 585, 309 P.3d 662 (2013) 10, 13, 15

Statutes

RCW 18.155.030 27

RCW 42.56.030 21

RCW 42.56.230(1)..... 40

RCW 42.56.230(4)(b) 40

RCW 42.56.240(1)..... 39, 40

RCW 42.56.240(6)..... 39

RCW 42.56.360 19

RCW 42.56.360(2)..... passim

RCW 42.56.550(4)..... 53, 60

RCW 42.56.565(1).....48, 49, 52

RCW 70.02.010(15)..... 27

RCW 70.02.010(19)..... 27

RCW 70.02.010(23)..... 38

RCW 70.02.020 ..... 23, 37

RCW 70.02.020(1)..... 11

RCW 70.02.050(2)(a).....21, 22, 23

RCW 70.02.060 11

RCW 70.02.080 ..... 11, 22

RCW 70.02.090 22

RCW 70.02.090(1)..... 21, 22

RCW 70.02.220(7).....21, 22, 23

RCW 70.02.230 .....32, 33, 34, 38

RCW 70.02.230(1)..... 36, 38

RCW 70.02.230(2)..... 38

RCW 72.09.111 57

RCW 72.09.111(1)(a)..... 53, 59

RCW 72.09.480(3)..... 53, 57

RCW 82.36.450(4)..... 40

RCW Chapter 13.50..... 13

RCW Chapter 42.56..... 17, 25

RCW Chapter 70.02..... passim

RCW Chapter 72.11.....53, 57, 58

Uniform Health Care Information Act..... passim

Other Authorities

1997 Attorney General Opinion 25, 26

Rules

RAP 14.4 60

RAP 2.5(a).....32, 35, 45

RAP 9.11 44

Regulations

WAC 246-08-390..... 24, 25

WAC 246-08-390(1)..... 24

I. INTRODUCTION

The superior court correctly concluded that a request to a provider for a patient's health care records, such as the request for the SOTP patient files at issue in this case, is governed exclusively by the Uniform Health Care Information Act (UHCIA). The plain and unambiguous language of RCW 42.56.360(2) compels that result: "Chapter 70.02 RCW applies to public inspection and copying of health care information of patients." The superior court erred, however, when it determined that Wallin's request for the SOTP patient records of 96 women incarcerated at the Washington Corrections Center for Women (WCCW), sought something beyond the SOTP patient files and that the Department violated the Public Records Act (PRA) by declining to produce redacted copies of the records. That error requires reversal.

Wallin resists this conclusion by claiming that prior case law settles that SOTP records are public records and that prior case law refers to the PRA as incorporating the UHCIA. This

argument misses the point. SOTP treatment records are public records, but they are public records that are subject to a separate statutory mechanism, the UHCIA, that provides the exclusive means for obtaining such records from a provider. This outcome is dictated by RCW 42.56.360(2) and the conflicting procedural mechanisms in the UHCIA and the PRA. Wallin does not even attempt to explain how such procedural mechanisms can be harmonized. As such, the superior court erred in requiring these documents to be produced under the PRA in a redacted form. Thus, this Court should reverse the superior court's conclusion that the Department violated the PRA and remand for dismissal of Wallin's PRA claims.

Even if the Court were to disagree with the Department's arguments on the merits, however, it should reject Wallin's cross appeal. First, the superior court properly exercised its discretion in declining to stay the case for Wallin to conduct discovery. Although the Court denied a stay, it did continue the hearing on the issue of penalties and Wallin does not show what additional,

relevant discovery he was prevented from propounding. Second, the superior court correctly denied Wallin penalties because he failed to show the Department acted in bad faith in denying him records. Instead, the Department followed a legal position that was neither farfetched nor malicious. Finally, the superior court did not abuse its discretion in reducing Wallin's costs because Wallin only prevailed on a quarter of his PRA claims.

II. STATEMENT OF FACTS[1]

In October 2018, the Department received a public records request from Jamie Wallin. CP 148. In one part of his request, Wallin sought "[a]ll sex offender treatment program (SOTP) records for persons who participated in SOTP, as well as the SOTP Aftercare Program, at the Washington Corrections Center for Women" for a fifteen year period. CP 148. In response, the Department explained that the patient records were exempt from

[1] The Department's Opening Brief included a statement of facts related to the issues it raised on appeal. This statement of facts contains only the facts relevant to the issues raised by Wallin's cross appeal.

disclosure and could not be provided absent a signed release from the patient. CP 172-73. Wallin had submitted substantially the same request in August 2017 and had received the same response. CP 141-42.

Wallin filed a lawsuit challenging the Department's response with regard to the SOTP patient records. CP 4-6. Wallin also challenged the Department's response to another part of his request, relating to the CVs of SOTP providers. CP 4-6. And he also raised claims related to another request he had submitted, which sought two types of JPay[2] records. CP 27-33. In his reply brief, Wallin abandoned his arguments with respect to the CVs of SOTP providers. CP 287. The superior court dismissed Wallin's claims regarding the CVs and JPay records. Wallin has not challenged the dismissal of those claims on appeal.

[2] JPay is a private company that contracts with the Department to provide various services to incarcerated individuals, including emessaging services. CP 205.

With respect to the records of the SOTP patients, the superior court concluded that the Department "violated the PRA by failing to collect and redact the records in response to Plaintiff's request." CP 376. The court acknowledged that "[t]he law seems to recognize that a request for a particular patient's medical record is governed exclusively by RCW 70.02" and also that the records certainly included healthcare information. CP 376. Nonetheless, the court concluded that Wallin's request was not for patient files "specifically and exclusively." CP 376. After the court denied reconsideration and clarification, the Department obtained a stay of the order from this Court.

Meanwhile, the superior court addressed the issue of penalties and costs. The superior court initially set a hearing to address penalties on May 7, 2021. CP 377. Wallin filed a motion asking the court to strike the penalty hearing and stay the case. CP 397-98. The court denied the motion to stay but continued the hearing until June 18, 2021. CP 434. Wallin filed an opening brief addressing penalties and costs. CP 493-512. This brief did

not ask for an extension or assert that additional discovery was required. CP 493-512. Wallin also asked for costs in the amount of $445.39, including photocopy fees, typing paper fees, and typewriter ribbon fees. CP 453. He did not distinguish his costs on the claims on which he prevailed from those claims on which he did not prevail. CP 453. The Department argued that his costs should be reduced to $221.70 in light of the fact that he had only prevailed on twenty-five percent of his claims. CP 524.

The superior court concluded that penalties were not appropriate because Wallin failed to show that the Department denied him records in bad faith. CP 580. Instead, the court concluded that the Department's position was not unreasonable or malicious. CP 580. The court awarded $221.70 in costs to Wallin to be paid into his trust account. CP 581. Wallin filed a motion for reconsideration in which he asked the court for the first time to allow costs to be paid to his "attorney-in-fact." CP 560-61. The court denied that motion. CP 589-90. Wallin cross appeals the denial of penalties and the reduction of his costs.

III. ARGUMENT

A. All of the Requested Records Were Contained in the SOTP Patient Files

The superior court appeared to agree with the Department's argument that the UHCIA was the exclusive mechanism for obtaining health care information from a provider. CP 376. The superior court, however, found that the records that Wallin was seeking were not "patient files specifically and exclusively." CP 376. This finding is not supported by substantial evidence because the only evidence presented to the trial court indicated that all of the requested records were contained in the SOTP patients' treatment files. This factual error provided the basis for the superior court's erroneous determination that the Department violated the PRA.

The Department's opening brief argued that the superior court erred in concluding that Wallin was seeking records outside of the SOTP treatment files. Opening Br., at 24-29. Despite this, Wallin barely addressed this issue in his response brief. He did

not point to any specific part of the record that supported the superior court's finding or any part of the record that rebutted the Department's evidence. CP 119-20, 338-391 (indicating all SOTP treatment records are maintained in the client's treatment file). Instead, he argues that the superior court "understood exactly what he was requesting" because his "request was plain on its face." Resp. Br., at 24. Such conclusory statements do not provide support for the superior court's finding.

Wallin also confusingly suggests that none of the records that he was seeking were actual patient files because they are maintained in a SOTP patient file that is maintained separately from medical, dental, and mental health records. Resp. Br., at 25. If that were the case, the superior court's conclusion that some of the records were patient files would be erroneous; Wallin did not appeal that decision though. In actuality, the fact that SOTP records are maintained separately from other treatment files does not mean that Wallin was seeking records beyond the SOTP files themselves or that the SOTP files are not themselves patient

records. The fact that the Department stores some health records in different files does not mean that only some of those files are protected health care information.

Ultimately, Wallin has been given multiple chances throughout this litigation to explain the scope of his request and clarify what documents, if any, he was seeking outside of the SOTP patient files. For whatever reason, Wallin has chosen to not provide such clarity and has kept his request vague, shifting from seeming to concede that some of the records are medical records to arguing that none of them are. Regardless of Wallin's shifting position, the Department presented evidence that all of the records he sought would be contained in SOTP treatment files. CP 119-20, CP 389-90, CP 527; *see* Opening Br., at 24-29. There is no evidence to the contrary. Thus, the superior court's conclusion that Wallin sought records outside of the SOTP patient files was not supported by substantial evidence and Wallin has not shown otherwise.

B. Because Wallin Requested Patient Records from a Health Care Provider, the UHCIA Provides the Exclusive Mechanism for Obtaining These Records

The superior court concluded that the Department violated the PRA in its response to Wallin's request. However, as the superior court appeared to recognize, the UHCIA is the exclusive mechanism for obtaining a patient's medical record. That conclusion is correct and this Court should conclude that the UHCIA is the exclusive mechanism for obtaining medical records from a health care provider and that Wallin's request for such records cannot form the basis for a PRA violation. Because all of the records sought here were contained in the SOTP patient files, the UHCIA was the exclusive means for Wallin to obtain the records at issue in this case.

This Court has recognized that some statutory provisions have the effect of creating an exclusive mechanism for obtaining public records. *Wright v. State*, 176 Wn. App. 585, 596, 309 P.3d 662 (2013). With respect to records that fall within the UHCIA, the Legislature has adopted an explicit provision in the PRA that

indicates that the UHCIA is the proper mechanism for obtaining health care information in the hands of medical providers. Specifically, RCW 42.56.360(2) states "Chapter 70.02 RCW applies to public inspection and copying of health care information of patients." RCW 42.56.360(2).

The UHCIA's language is also explicit that records cannot be released absent some exception contained in the UHCIA. RCW 70.02.020(1) ("Except as authorized *elsewhere in this chapter*, a health care provider…may not disclose health care information about a patient to any other person without the patient's authorization." (emphasis added)). The UHCIA has its own procedural mechanisms to access such records. RCW 70.02.060, RCW 70.02.080; *see* Opening Br., at 19-20. As such, the UHCIA governs the SOTP patient files at issue in Wallin's request.

Wallin argues that this conclusion is foreclosed by prior case law, the statutory language in the PRA and the UHCIA, a regulation from the Department of Health (DOH), and a prior

opinion of the Washington Attorney General. Wallin is incorrect. None of the prior decisions cited by Wallin that discussed the UHCIA dealt with complete patient files in the hands of a medical provider. Moreover, although courts have often referred to RCW 42.56.360(2) as "incorporating" the UHCIA into the PRA, the plain language of that provision requires a conclusion that the UHCIA, not the PRA, governs disclosure of patient records. The provisions of the UHCIA cited by Wallin are not to the contrary. Finally, the other authorities cited by Wallin carry limited weight in terms of the interpretation of RCW 42.56.360(2), but, to the extent that they do, they favor the Department's interpretation.

1. Prior Case Law Did Not Resolve This Question Because the Issue Was Never Addressed in Those Opinions

"An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *Cont'l Mut. Savings Bank v. Elliot*, 166 Wn. 283, 300, 6 P.2d 638 (1932). Although

Wallin spends a significant time arguing that the issues in this case have already been decided by prior case law, he is incorrect. The decisions that he cites did not address whether the UHCIA is the exclusive mechanism for obtaining patient files in the hands of a health care provider. Given that none of those prior decisions address the arguments being made in this case, such decisions do not resolve this issue.

As an initial matter, Wallin spends significant time addressing the issue of whether SOTP records are public records. Resp. Br., at 11-12 & 22-23. Such arguments miss the issue in this case. In *Wright*, the juvenile records were public records. *Wright*, 176 Wn. App. at 596. However, as the Court noted, this "does not automatically mean that the records at issue here were subject to disclosure under the PRA or penalties for failure to make such a disclosure." *Id.* The Court went on to conclude that Chapter 13.50 was the exclusive means to obtain juvenile records. *Id.* at 596-98. Similarly, the Department is not arguing

the records are not public records. Instead, the issue is whether the UHCIA is the exclusive means for getting such records.

For similar reasons, *Oliver v. Harborview Medical Center*, 94 Wn.2d 559, 618 P.2d 76 (1980), provides no real guidance on the arguments being made by the Department in this case. That decision predated the enactment of the UHCIA by over a decade and dealt with a patient requesting their own medical records. *Id.* at 560-61. The opinion addressed whether patient records are public records. *Id.* at 566. It did not address whether the UHCIA—which had not even been enacted—provided the exclusive mechanism for obtaining patient records.

Wallin cites a number of decisions that he claims foreclose the Department's claims because the decisions concluded the PRA incorporates the UHCIA. Wallin overstates the significance of those decisions because (1) none of those decisions addressed the legal question at issue in this case, i.e. whether the UHCIA is the exclusive mechanism for obtaining patient records; (2) as a factual matter, none of those decisions dealt with a request for

patient records from a provider; and (3) although the decisions referred to the PRA as incorporating the UHCIA, this language appears to be a judicial gloss on the plain language of RCW 42.56.360(2).

First, none of the decisions cited by Wallin addressed whether UHCIA is the exclusive mechanism from obtaining patient files from a provider. None of those decisions mention this Court's *Wright* decision at all. It does not appear that the issue about the UHCIA being the exclusive mechanism for obtaining patient records was raised, and it was certainly not discussed. As such, those decisions cannot foreclose that argument in this case. *Cont'l Mut. Savings Bank*, 166 Wn. at 300.

Second, as a factual matter, none of the decisions involved requests for the complete patient files of patients from a health care provider. Almost all of the cases cited by Wallin deal with requests to public agencies for records that were shared with the public agency. *See John Doe G. v. Dep't of Corr.*, 197 Wn. App. 609, 620 n.31, 391 P.3d 496 (2017) (SSOSA evaluations in the

hands of the Department of Corrections), *rev'd*, 190 Wn.2d 185, 410 P.3d 1156 (2018); *John Doe P. v. Thurston Cnty.*, 199 Wn. App. 280, 295-97, 399 P.3d 1195 (2017) (SSOSA evaluations in the hands of the County), *review granted and remanded*, 190 Wn.2d 1018, 418 P.3d 796 (2018); *Lee v. City of Seattle*, No. 75815-2-I, 2018 WL 2203287, at *8, 3 Wn. App. 2d 1055 (2018)[3] (drug evaluation shared with County); *Simpson v. Okanogan Cnty.*, No. 28966-4-III, 2011 WL 1549230, at *1, 161 Wn. App. 1025 (2011) (victim's medical records shared with County).[4] Notably, in *Simpson*, the Court concluded that the County did not violate the PRA by declining to produce redacted copies of a crime victim's medical records. *Id.* at *3.

[3] This case is unpublished. Consistent with GR 14.1, the Department informs the Court that this decision has no precedential value, is not binding on any court, and is cited only as persuasive authority as the court deems appropriate. *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

[4] This case is unpublished. *See* Footnote 3, *supra*.

Prison Legal News v. Department of Corrections, 154 Wn.2d 628, 115 P.3d 316 (2005), which Wallin cites (Resp. Br. At 19), also does not address these issues. *See* Opening Br., at 17-18. Although the Department is a provider in some circumstances, including in the provision of SOTP treatment, the request at issue in *Prison Legal News* did not seek entire patient files, let alone the files of an entire claim of patients, from a provider. Instead, the requester sought investigative records pertaining to disciplinary action against medical staff and records of Department staff who were practicing with suspended licenses. *Prison Legal News*, 154 Wn.2d at 632-33.[5]

In the decision, the Supreme Court addressed the Department's redaction of all references to medical information, including names, treatments, and medical conditions in these

[5] The *Prison Legal News* case analyzed a prior version of RCW 42.56.360(2) in the Public Disclosure Act that was recodified with the recodification of the PRA into Chapter 42.56 RCW. The recodification did not change the meaning of this provision and the Department cites to the current version of the statute.

investigative records. *Id.* at 644. The Court ultimately concluded that the requester should have been given the right to contest these redactions and that the Department would be required to prove the redactions were warranted upon remand. *Id.* at 647. Although the Court laid out some very general principles regarding the UHCIA and the PRA, it did not discuss or address whether a requester can obtain the complete patient files of specific patients from a health care provider through the PRA. Given the issues presented in *Prison Legal News*, including its focus on investigative and disciplinary records, the decision sheds little light on whether the UHCIA is the exclusive mechanism for obtaining patient files (an issue not addressed in the opinion) or whether Wallin is entitled to unredacted copies of SOTP patient files.[6]

[6] When the Supreme Court initially provided a comprehensive, categorized list of the various PRA exemptions in *Resident Action Council v. Seattle Housing Authority*, 300 P.3d 376, (2013) *amended by Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600 (2013), the Supreme Court omitted any reference to RCW 42.56.360(2). The

Finally, although decisions refer to the idea that the UHCIA is "incorporated" into the PRA, this language is a judicial gloss on the statute that is unhelpful when deciding whether the UHCIA is the exclusive mechanism for obtaining patient files. The PRA does not say that the UHCIA is incorporated into the PRA. It says that the UHCIA "applies to public inspection and copying of health care information of patients." RCW 42.56.360(2). The plain meaning of this provision is that the UHCIA, not the PRA, governs requests to health care providers to inspect and copy health care information of patients, such as the SOTP participants, who are the subject of Wallin's request.

Supreme Court's list did include a reference to every other subsection of RCW 42.56.360 that was part of RCW 42.56.360 at the time. Although the Supreme Court subsequently withdrew this list from its opinion, the conspicuous omission of RCW 42.56.360(2) from a case that postdated the *PLN* decision signals that the Supreme Court itself may not view RCW 42.56.360(2) as a normal exemption provision; at the very least, it signals it is an open question.

Moreover, merely saying the UHCIA is incorporated into the PRA, even if it accurately captured the statutory language, does not explain the significance of such "incorporation." For example, it does not explain how to rectify the conflicting procedural mechanisms in the UHCIA and PRA. And it does not explain whether a provider is required to provide specific patient files to any person that requests such files through the PRA. Given that, prior opinions referring to the PRA as "incorporating" the UHCIA do not explain how that impacts the analysis for a request, such as Wallin's, that is directed to a provider and seeks entire patient files. Based on the plan language of RCW 42.56.360(2), such requests are governed exclusively by the UHCIA.

Because Wallin's request sought records that were exclusively available under the UHCIA, the superior court erred in concluding that the Department's response violated the PRA.

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2. The Other Authorities Cited by Wallin Do Not Undermine This Conclusion

As discussed above, the plain language of RCW 42.56.360(2) indicates that the UHCIA is the exclusive mechanism for obtaining patient records from a health care provider. Wallin argues that the Department's interpretation is undermined by other statutes and other authorities. Like his arguments regarding existing case law, the authorities that he cites do not resolve the issue in his favor.

Wallin cites to RCW 42.56.030, RCW 70.02.090(1), RCW 70.02.050(2)(a), and RCW 70.02.220(7). These statutes do not contradict the conclusion that the UHCIA is the exclusive mechanism for obtaining patient files from a health care provider. RCW 42.56.030 merely establishes that the PRA governs if there is a conflict between the PRA and another act. However, there is no conflict here between the PRA and the UHCIA. Instead, RCW 42.56.360(2), which is part of the PRA, makes the UHCIA the exclusive mechanism for obtaining patient

records. Because that provision is part of the PRA, there is no conflict between the PRA and the UHCIA.

Similarly, RCW 70.02.090 does not undermine the conclusion that the UHCIA is the exclusive mechanism for obtaining patient records from health care providers. The UHCIA provides a specific mechanism for patients to examine their own medical records. RCW 70.02.080. RCW 70.02.090 deals with enumerated situations in which a health care provider may deny a request, i.e. where knowledge of the information would itself injure the patient's health, "[s]ubject to any conflicting requirement in the public records act." RCW 70.02.090(1). These provisions actually support the idea that the UHCIA provides the exclusive procedural mechanism for obtaining medical records from a provider because the provisions demonstrate that it is the UHCIA which controls such requests, absent express language in the UHCIA to the contrary.

RCW 70.02.050(2)(a) and RCW 70.02.220(7) also do not undermine the Department's position. Both provisions create

public records exemptions when health care information is disclosed to public health authorities. Such exemptions are necessary because the information, once it is shared with public health authorities, would not normally be subject to the UHCIA. That is because the UHCIA generally deals with health care information in the hands of health care providers. RCW 70.02.020.

The interaction between the PRA and the UHCIA depends heavily on the nature of the entity that possesses the information. When a patient file is in the hands of a health care provider, the UHCIA provides the exclusive mechanism for obtaining the patient files. RCW 70.02.020. When a provider shares the information with a public agency, however, the information would be subject to the PRA and must be produced in response to a public records request absent an exemption, such as the exemptions created by RCW 70.02.050(2)(a) and RCW 70.02.220(7). In this sense, Wallin appears to largely agree with the Department in terms of how these provisions interact. Resp.

Br., at 17 n.7. However, the parties diverge on whether public agencies can ever be health care providers and whether the UHCIA provides the exclusive mechanism to obtain health care information from public agencies that are also providers. In this case, as discussed in more detail below, the Department is clearly a health care provider in the context of SOTP patients.

Wallin also points to a DOH regulation to support his arguments. The DOH regulation, WAC 246-08-390, cannot alter the plain language of RCW 42.56.360(2) so its usefulness is somewhat limited. Further, WAC 246-08-390 deals with health care information shared with a public health agency, not a health care provider. WAC 246-08-390(1) (explaining that DOH "regularly obtains individually identifiable health care information … necessary for the department to carry out public health activities"). In other words, the regulation governs DOH's actions as a public agency with administrative responsibilities, who receives health care information from providers. Requests

to such administrative agencies are not the equivalent of requesting patient files from a provider.

Moreover, the regulation itself says "chapters 70.02 *and RCW 42.56* apply to the public inspection and copying of health information." WAC 246-08-390 (emphasis added). This language does not mirror the language in RCW 42.56.360(2). RCW 42.56.360(2) refers only to chapter 70.02. The Legislature did not include the words "and RCW 42.56" in RCW 42.56.360(2) when it enacted that statute. If it had, Wallin might have a stronger argument. The fact that the Legislature only included a reference to chapter 70.02 provides strong support to the Department's argument that the UHCIA is the exclusive mechanism for obtaining patient files from a provider.

Finally, Wallin misconstrues the 1997 Attorney General Opinion. That Opinion dealt with diet forms provided to the DOH. Op. Att'y Gen. 2 (1997). Contrary to Wallin's claim, the Opinion actually concluded "[t]he diet information forms and the computer analysis are not health care information of patients."

Id. Based on that conclusion, this Opinion provides no guidance to the issues in this case. Therefore, the authorities cited by Wallin do not undermine the Department's position that RCW 42.56.360(2) is the exclusive mechanism for obtaining SOTP patient files from health care providers.

3. Wallin's Belated Attempts to Question Whether the UHCIA Applies to These Records Are Unpersuasive

The trial court correctly concluded that the documents in question contained health care information and were subject to the UHCIA. CP 376. Wallin now appears to suggest that the documents do not fit within the definition of health care information because (1) the Department is not a health care provider; (2) SOTP treatment is not health care; and (3) Wallin believes the Department's policies do not treat SOTP treatment and their corresponding records as health care. All of these arguments are unsupported and fail.

First, according to Wallin, the Department is not a health care provider based on *John Doe G. v. Department of*

Corrections, 197 Wn. App. 609, 391 P.3d 496 (2017). Resp. Br., at 12. Wallin is incorrect about the Department's role in the SOTP program and *John Doe G*. SOTP treatment providers meet the definition of a "health care provider" in RCW 70.02.010(19) because they are all licensed counselors. CP 119; *see also* RCW 18.155.030 (requiring certification to be a SOTP provider).

Second, SOTP providers provide health care. In the relevant part, the UHCIA defines health care as including "any care, service, or procedure provided by a health care provider: (a) to diagnose, treat, or maintain a patient's physical or mental condition." RCW 70.02.010(15). As it relates to the SOTP program, Department staff who are licensed SOTP providers are treating the participant's mental conditions. CP 119. That meets the UHCIA's definition of "health care."

Contrary to Wallin's arguments, *John Doe G. v. Department of Corrections*, 197 Wn. App. 609, 391 P.3d 496 (2017), and the Supreme Court's decision in the same case, do not establish that the Department is never a health care provider.

In *John Doe G.*, the Supreme Court addressed a request for a Special Sex Offender Sentencing Alternative (SSOSA) evaluations created as part of a sentencing decision. *John Doe G. v. Dep't of Corr.*, 190 Wn.2d 185, 193, 410 P.3d 1156 (2018). The Court concluded that the evaluations were forensic in nature and therefore was not health care information. *Id.* at 194-95. Importantly, the case involved private providers who conducted these forensic evaluations. *Id.* at 195 (noting that the evaluator did not provide the ultimate sex offender treatment). As such, the case sheds no light on the issue of whether DOC is acting as a health care provider in this circumstance.

Wallin also claims that the Department's policies support the idea that SOTP treatment information is not health care information. Wallin premises this claim on the idea that the Department has a policy for the SOTP program that is separate from Department policies governing other forms of medical care. Resp. Br., at 25. The fact that the SOTP policy is separate from other policies does not mean that the Department treats SOTP

treatment as beyond RCW 70.02. To the contrary, the SOTP policy expressly references RCW 70.02 at the very beginning of the policy. CP 124. Additionally, the SOTP policy expressly discusses confidentiality and the limitations of confidentiality. CP 129-30. The fact that there is a policy for SOTP records that is separate from other forms of medical care and that SOTP records are kept separately from other medical records does not establish that SOTP is not a form of medical care.[7]

Finally, Wallin argues that the patient's rules of confidentiality and informed consent form demonstrate that the records are releasable. Resp. Br., at 34. As an initial matter, Wallin did not submit these records in his briefing in the trial

[7] Wallin also suggests that the Department and its counsel are "misinformed about what constitutes health care information." Resp. Br., at 33 (citing RP 11). Wallin, however, edits the quote from the Department's counsel in the superior court to change the meaning. In actuality, the Department's counsel stated "These records, records of women disclosing their most personal and intimate details to their treatment providers, are health care information." RP 11. The Department's counsel then went on to analyze the statutory language. *Id.*

court. Regardless, the documents do not demonstrate that patients have authorized the release of their records under the PRA. Nothing in the SOTP confidentiality rules suggest that the patient's records are going to be released to anyone who requests them under the PRA or that they would be shared with public records staff to review as part of a public records request.

Wallin claims that the form tells participants "that most information received during the course of the program, whether written or verbal, is not confidential." Resp. Br., at 6. But the form contains no such statement. Motion to Strike, Appendix C. Wallin points to no other provision of the confidentiality form that would notify patients that their records will be released in response to PRA requests. Consequently, even if the Court were to consider this new evidence on appeal, it would not support Wallin's arguments.

Based on the plain language of RCW 42.56.360(2), the UHCIA is the exclusive mechanism for obtaining patient files from a health care provider. Because Wallin's request sought

patient files from the Department and the Department was acting as a provider, his request was governed exclusively by the UHCIA. This Court should reverse the conclusion that the Department violated the PRA and remand for dismissal of Wallin's claims.

C. The Patient Files Were, in the Alternative, Categorically Exempt under the PRA, and the Department Properly Raised That Argument Below

As discussed above, the superior court erred in concluding that the Department violated the PRA because the UHCIA provides the exclusive mechanism for obtaining these SOTP patient records. Even if the PRA did apply, however, the Department properly withheld the records in question because they are categorically exempt from production under the PRA. Contrary to Wallin's arguments, the Department did not waive this issue by failing to raise it below. On the merits of the issue, the Department demonstrated that redaction of these records is effectively impossible and not required by the UHCIA.

1. The Department Did Not Waive This Argument

Appellate courts generally do not consider issues raised for the first time on appeal. RAP 2.5(a); *see State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). RAP 2.5(a) is permissive.

Wallin argues that the Department is raising new arguments on appeal that should not be considered under RAP 2.5(a). The Court should reject Wallin's argument. It was clear that the Department was invoking RCW 70.02.230 as a basis for withholding the records. The Department referred to the records as mental health information in its response letter to Wallin. CP 172-73. The Department has indicated throughout its litigation that the records at issue were mental health treatment records that were protected under RCW 70.02. CP 142 (describing records as mental health records), CP 296 (describing records as SOTP treatment files of women who received treatment from licensed mental health providers); CP 516; *see also* RP 11 (discussing fact that SOTP treatment providers treat symptoms of mental health

conditions). In fact, Wallin's own opening brief in the superior court recognized this: "it is DOC's position that 'the mental health treatment records are categorically exempt absent a valid release or court order.'" CP 23.

Wallin's argument that the Department should be foreclosed from invoking RCW 70.02.230 in its arguments that SOTP records cannot be released with redactions ignores the procedural history of this case. The focus of the parties' arguments has largely been on whether the entirety of the UHCIA provides the exclusive mechanism for obtaining these records. The parties have often referred generally to RCW 70.02 in their briefing. *See*, *e.g.*, CP 284, CP 297. After the initial round of briefing, the trial court limited further briefing to the issue of whether RCW 42.56.360(2) makes the UHCIA the exclusive means to access patient records. *See* CP 293-294 (limiting further briefing to RCW 42.56.360(2)). The trial court ultimately agreed with the Department's argument that the UHCIA appeared to be the exclusive means for obtaining these records and also referred

generally to RCW 70.02. CP 376. Moreover, as Wallin ultimately concedes, the issue of whether information is health care information and whether it is mental health information is linked. Resp. Br., at 29. In light of this history, the issue of RCW 70.02.230 was adequately raised.

Similarly, the Department properly raised the issue that it could not meaningfully deidentify the complete patient files that Wallin requested here. Although the lower court proceedings focused on the Department's *obligation* (as opposed to ability) to deidentify the records at issue here, the question of whether the records could be adequately deidentified was also discussed below. CP 105 (arguing complete treatment files could be readily associated with patient), CP 142 (discussing inability to redact), CP 302, CP 527-28. And again, the limited discussion of this issue was primarily as a result of the trial court's limiting of the issues in subsequent briefing. *See* CP 293-294. The Department provided briefing and factual support for its belief that the records could not be meaningfully deidentified. *See* CP 302

(arguing meaningful redaction is not required when impossible); CP 527-28 (declaration discussion inability to redact records). And the trial court actually ordered the Department to gather and deidentify the records. CP 373-377, 433-435. This alone should be sufficient to preserve this issue for appeal. More broadly, it is not reasonably debatable that one of the primary issues before the trial court was the deidentification of the patient treatment files. So it is unclear how the question of whether they could in fact be deidentified is not encompassed in that larger issue.

Finally, even if this Court were to determine that the issues were not adequately preserved for appeal, this Court has the discretion to consider such arguments. The wording in RAP 2.5(a) is permissive. For example, appellate courts are often willing to consider a statute, a rule, or case law that was not brought to the attention of the trial court, as long as the basic contentions were presented to the trial court. *See Osborn* v. *Pub. Hosp. Dist. I, Grant Cnty.*, 80 Wn. 2d 201, 492 P.2d 1025 (1972), (applicability of a statute could be raised on appeal when the

issue of the duty to which the statute related was raised below). Even if RCW 70.02.230(1) was not raised below as clearly as it is being raised on appeal, the Department argued throughout the lower court proceedings that it owed the SOTP clients a duty of confidentiality and also that deidentification was not required or feasible. Perhaps most importantly, the impact if the Court declined to review this issue would be to the significant detriment of the women who participated in SOTP. Their sensitive records should not be released to Wallin based on this purported waiver. The fact that the interests of third parties are at stake if the Court allows for release of these records unredacted weighs heavily in favor of considering these arguments, even if the Court were to conclude that they were not adequately raised below.

And this Court's consideration of the issues as presented by the Department would not be an injustice to Wallin. Indeed, Wallin was on notice that the Department was arguing that SOTP was a mental health service (*see* CP 10, 19, 23, 115-121, 526-27) and this allowed him to submit any evidence to rebut that.

Similarly, Wallin was on notice that the Department was arguing that it could not and should not be obligated to deidentify the SOTP patient files. Specifically, the Department argued that meaningful redaction was effectively impossible and that any attempt to deidentify would be futile. *See* CP 302. Wallin has responded substantively to those arguments on appeal. Resp. Br., at 29-35. Therefore, Wallin would not be prejudiced by this Court's consideration of these issues.

Because the Department adequately raised these issues in the superior court, the Court should consider these arguments.

2. Even if the UHCIA Is Not the Exclusive Mechanism for Obtaining These Records, They Are Nonetheless Categorically Exempt under the PRA

Even if the Court concludes that the UHCIA is not the exclusive mechanism for obtaining patient records, the Court should conclude that the UHCIA categorically exempts mental health records, such as the SOTP treatment records. These records are protected under RCW 70.02.020 and RCW

70.02.230, and they cannot be deidentified in a manner that protects the privacy of the patients. The superior court therefore erred in requiring the Department to deidentify these records.

Wallin argues that the invocation of RCW 70.02.230 is circular. RCW 70.02.230(2) uses the term "[i]nformation and records related to mental health services," RCW 70.02.230(2), and that term is defined as a "type of health care information." RCW 70.02.010(23). Wallin's argument, however, ignores the introductory subsection of RCW 70.02.230. That subsection categorically says:

> The fact of admission to a provider for mental health services and all information and records compiled, obtained, or maintained in the course of providing mental health services to either voluntary recipients of services at public or private agencies may not be disclosed except as provided in this section [and various other provisions]

RCW 70.02.230(1). The broad language in this provision establishes that mental health information is provided heightened confidentiality and must be given heightened protection by providers, including the very fact that a person received mental

health evaluation or treatment at all. Deidentification of mental health treatment records would be wholly inconsistent with that broad protection. Moreover, the redaction of these types of treatment records cannot be done in a manner that would protect the identity of the patient. CP 526-27.

Wallin argues that this argument is foreclosed by case law. Resp. Br., at 32. The circumstances when a record can be released in a redacted form, however, is dependent on the nature of the exemption and the nature of the underlying records. None of the cases cited by Wallin involve the UHCIA or SOTP records. Instead, these cases involve exemptions such as the intelligence and investigative records exemption in RCW 42.56.240(1),[8] the child victims of sexual assaults exemption in RCW 42.56.240(6),[9] the taxpayer information exemption in

[8] *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011) (application of RCW 42.56.240(1) to an internal and criminal investigation).

[9] *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) (application of RCW 42.56.240(6) to police investigation).

RCW 42.56.230(4)(b),[10] and personal information of welfare recipients exemption in RCW 42.56.230(1).[11] These cases interpreting different exemptions do not answer whether there is a circumstance in which the UHCIA acts as a categorical exemption that prevents release of records even in an unredacted form.

Bainbridge Island itself did not even establish that the investigative records exemption is never a basis to withhold entire documents. In fact, that particular exemption, RCW 42.56.240(1), is categorical in some circumstances. *See Newman v. King Cnty.*, 133 Wn.2d 565, 575, 947 P.2d 712 (1997). The UHCIA exemption as it relates to sensitive mental health records is also a categorical exemption. As the Supreme Court has

[10] *West v. Department of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (2014) (application of RCW 42.56.230(4)(b) and RCW 82.36.450(4) to records related to motor vehicle fuel tax payments to Indian Tribes).

[11] *SEIU Healthcare 775NW v. State, DSHS*, 193 Wn. App. 377, 377 P.3d 214 (2016) (application of RCW 42.56.230(1) to a list of home health care providers).

observed, some exemptions may permit the withholding of an entire document if meaningful redaction is impossible. *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600, 606 (2013). In this case, the SOTP records are not capable of meaningful redaction. Contrary to Wallin's arguments, this result is based on the nature of the records themselves, not merely because of the possibility that someone could link these records with the patient's identity. Given this, the case law Wallin cites does not foreclose the categorical exemption of SOTP records.

Wallin also argues that this argument is not supported by evidence. The Department, however, submitted declarations that addressed these issues. CP 527-28. The declarations adequately demonstrate that the records cannot be deidentified. Moreover, based on the nature of sex offender treatment, it is reasonable to conclude such records cannot be deidentified. As the Department explained, the SOTP files "many times contain narratives of full family history, mental health of family, family locations,

significant family events (to include family victimization and the relationship between the individuals)." CP 527. These details would make deidentifying the records "a near-impossible task" and runs the risk of Public Records Specialists releasing information that could lead to the identification of these patients. CP 526-27. Regardless, if this Court concludes that the evidence did not adequately address the issue or that the issue was premature, the appropriate remedy would be to remand the case to the superior court.

Finally, Wallin suggests that sex offenders have lessened privacy interests and that warrants adopting his interpretation. The cases cited by Wallin, such as *State v. Parris*, 163 Wn. App. 110, 118, 259 P.3d 331 (2011), do not suggest that sex offenders have a lessened right to privacy in their health care information. And Wallin ultimately ignores the implications of his interpretation. His arguments are based on his interpretation of the UHCIA and the PRA and are not limited to SOTP records. Under Wallin's theory, any person could obtain a patient file of

a health clinic or facility run by a public agency, from student health centers to public hospitals, as long as the requester agrees to deidentification of the records. That would be an extraordinary result that this Court should reject.

Because the records cannot be reasonably deidentified, the superior court erred in requiring the Department to produce the records to Wallin.

D. The Court Should Decline to Consider Wallin's New Evidence and Unpreserved Argument That SOTP Patients Waive Confidentiality

Wallin has submitted new evidence in his motion to strike the Department's brief and he refers to this evidence in his brief. Resp. Br., at 34. He submits this new evidence because he argues that it is essential to rebut the arguments that he claims are new arguments being made by the Department. Wallin's Mot. to Strike, at 5. But this new evidence (1) could have been presented to the superior court; (2) is being used to support an unpreserved argument; and (3) does not provide a basis for determining that SOTP patients waive confidentiality of their records.

First, the Court should reject Wallin's claim that he could not have presented these documents to the superior court. After all, Wallin cited the form number of these forms in his original public records request. *Compare* Wallin's Mot. to Strike, Appendix B, Appendix C, & Appendix D (including DOC Form 02-194 and DOC Form 02-330), *with* CP 444 (referring to these forms by number in his requests). Similarly, Wallin referred to the Department policies that he seeks to add to the record in the superior court. CP 412. As such, Wallin's suggestion that he could not have submitted this evidence to the superior court is not accurate, and the evidence does not meet the RAP 9.11 criteria. *See State v. Ziegler*, 114 Wn.2d 533, 789 P.2d 79 (1990) (affirming the court of appeals decision to decline to consider new evidence that could have presented at trial under RAP 9.11).

Second, although Wallin claims that this new evidence is necessary to respond to the Department's arguments on appeal, he actually uses it to make a new argument: that SOTP participants waive their confidentiality. Resp. Br., at 34. This

theory was not presented to the superior court and it should not be considered in this Court. RAP 2.5(a).

Third, with respect to the merits of this waiver argument, the forms cited by Wallin do not provide a basis for affirming the superior court's decision that the Department violated the PRA. These documents do not establish that SOTP patients waive confidentiality of their records or otherwise authorize their records to be released in response to a public records request. *See* Section III.B.3, *supra*. For the reasons discussed above, the language in the forms provides no support whatsoever for Wallin's contention that SOTP participants somehow waive their confidentiality upon entry into the program. Thus, even if the Court considers this new evidence in support of Wallin's new argument, it does not provide a basis for affirming the superior court's decision.

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E. The Superior Court Properly Exercised Its Discretion in Denying Wallin's Motion to Stay the Penalty Phase to Allow for Additional Discovery

A trial court's decision to deny a motion to continue in order to conduct discovery is reviewed for abuse of discretion. *See Kozol v. Wash. State Dep't of Corr.*, 192 Wn. App. 1, 6-7, 366 P.3d 933 (2015). A court can deny additional discovery when the party has had adequate time to conduct discovery or the party fails to articulate what the additional discovery would show. *Id.*

In this case, Wallin moved to strike the penalty hearing in April and stay the case. CP 397-98. On April 20, 2021, the court denied the motion to stay but continued the penalty hearing for over a month from May 7 to June 18. CP 434. In his declaration in support of his penalty brief, Wallin stated in a conclusory manner that he was "precluded from being able to propound any discovery on the issue of bad faith." CP 459. However, Wallin did not explain how he was precluded given the timeframe between the two hearings and that he did not identify any specific

discovery requests he would have propounded. Wallin's penalty brief itself did not ask for a continuance to conduct additional discovery. CP 493-512. Given his failure to raise the issue as part of his penalty briefing in the extended schedule, Wallin arguably waived any claim of error related to this issue.

Regardless, Wallin has failed to show the trial court abused its discretion in not granting a stay or otherwise not granting a longer extension for him to conduct discovery. Wallin argues that the discovery was needed to show if the Department's conduct was "obstinate" or if it was being "dishonest" in its claims of exemption. Resp. Br., at 40. Such requests, however, do not actually appear to be designed to uncover additional facts. Instead, these statements appear to simply be arguments that Wallin wants to make based on the evidence. These are the same arguments that Wallin made in the superior court and makes before this Court. *See, e.g.*, CP 503 (arguing DOC knew legal position was indefensible). CP 429-30; Resp. Br., at 41-43. But, crucially for purposes of this issue, Wallin did not provide any

specific discovery requests that he would make, or any additional facts that he sought to uncover on the subject of bad faith. Nor does he explain how the unspecified discovery requests would alter the superior court's decision to deny penalties. Therefore, the trial court did not abuse its discretion by denying a stay of the case while granting an extension of the penalty hearing.

F. The Superior Court Correctly Denied Wallin Penalties Because He Failed to Show the Department Denied Him Records in Bad Faith

As an incarcerated individual, Wallin was entitled to daily penalties only if he proved that the Department acted in bad faith in denying him the opportunity to inspect or copy a public record. RCW 42.56.565(1). The bad faith inquiry has two interrelated components. First, the agency must have acted with a sufficiently culpable state of mind, i.e. bad faith. *See Lancaster v. Wash. State Dep't of Corr.*, No. 48708-0-II, 2018 WL 5277954, at *3-*5, Wn. App. 2d 1048 (2018) (unpublished).[12] Second, the agency's bad faith must have resulted in the denial of records. *Id.*

[12] This case is unpublished. *See* Footnote 3, *supra*.

The incarcerated requester bears the burden of showing bad faith under RCW 42.56.565(1). *See Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 952, 361 P.3d 749 (2015).

Although RCW 42.56.565(1) does not define "bad faith," the Court of Appeals has concluded that bad faith requires "a wanton or willful act or omission by the agency." *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 103-04, 332 P.3d 1136 (2014). A wanton act is one where the agency unreasonably or maliciously risks harm while being utterly indifferent to the consequences. *Id.* at 103. This standard is higher than simple or casual negligence. *Id.* The bad faith standard does not warrant penalties to an offender "simply for making a mistake in a record search or for following a legal position that was subsequently reversed." *Francis v. Wash. State Dep't of Corr.*, 178 Wn. App. 42, 63, 313 P.3d 457 (2013). An agency does not act in bad faith when the basis for the denial of records is not farfetched and is motivated by reasonable concerns. *King Cnty. v. Sheehan*, 114 Wn. App. 325, 356-57, 57 P.3d 307 (2002).

The superior court correctly concluded that the Department did not act in bad faith because the Department's legal position was not unreasonable or malicious. CP 580. Regardless of whether or not this Court decision on whether the Department violated the PRA, the Department's position is not malicious or farfetched. There is relatively little case law on RCW 42.56.360(2) and none that explains how that statute applies to SOTP records. Contrary to Wallin's repeated assertions, these issues have not been settled by prior case law. Indeed, the Commissioner of this Court appeared to recognize that the Department's legal position had colorable merit when granting discretionary review. And, significantly, the Department is in the uncomfortable position of being caught between the potential PRA liability if a court determines that its response violated by the PRA by releasing too little information, and the potential liability under the UHCIA if it incorrectly releases too much information about a patient. Given this, the

superior court correctly concluded that the Department did not act in bad faith in denying Wallin records.

Wallin argues that the superior court erred because the Department's position was based on an indefensible view of the law. However, this argument rests entirely on his conclusion that *Prison Legal News* and other cases clearly resolved the issues in this case. For the many reasons discussed above, Wallin is incorrect. Wallin also claims that the Department "recognized that only some of the information was exempt." Resp. Br., at 42 (citing CP 172). That document, which is the Department's initial five-day letter, does not support Wallin's statement.

Finally, Wallin argues that the Department acted in bad faith because the Department's arguments are not supported by the Department's own policies. Wallin, however, misconstrues these policies. None of these policies state that the Department will provide SOTP records to a public records requester in a redacted form. None of these policies answer the question of whether the UHCIA is the exclusive mechanism for obtaining

patient files. Moreover, Wallin cannot reasonably claim that the Department's position regarding SOTP records has been inconsistent or unclear. After all, Wallin submitted this exact same request in 2017 and the Department responded in the same way. CP 141-42. The policies do not demonstrate that the Department's position in this case was taken in bad faith.

Because the superior court correctly concluded Wallin failed to show bad faith, this Court should affirm the decision to deny him penalties under RCW 42.56.565(1).

G. The Superior Court Did Not Abuse Its Discretion in Reducing Wallin's Costs and Ordering the Amount to Be Paid Into His Trust Account

The superior court awarded Wallin costs in the amount of $221.70 and indicated that the costs should be paid into Wallin's inmate trust account. CP 581. Neither of these decisions constitutes an abuse of discretion. The court was entitled to reduce Wallin's costs because he only prevailed on claims related to one of his four claims. Additionally, the court correctly prevented Wallin from attempting to circumvent the statutory

deduction scheme in RCW 72.09.480(3), RCW 72.09.111(1)(a), and chapter 72.11 RCW.

1. The Superior Court Did Not Abuse Its Discretion in Reducing Wallin's Costs

A trial court's decision to award a certain amount of costs is subject to review for abuse of discretion. *Sanders v. State*, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010). In the context of the PRA, reasonable costs are recoverable for claims upon which a party prevailed. *Id.*; *Wash. State Dep't of Trans*. *v. Mendoza de Sugiyama*, 182 Wn. App. 588, 605, 330 P.3d 209 (2014). Although RCW 42.56.550(4) refers to "all costs," courts have interpreted this language to mean all reasonable costs. *American Civil Liberties Union of Wash. v. Blaine School District No. 533*, 95 Wn. App. 106, 117, 975 P.2d 536 (1999); *see Eggleston v. Asotin Cnty.*, No. 34340-5-III, 2017 WL 6388976, at *8, 1 Wn. App. 2d 1045 (2017).[13] The superior court reduced Wallin's costs by half because he only prevailed on some of his claims. In the

[13] This case is unpublished. *See* Footnote 3, *supra*.

superior court, Wallin raised four total claims about two separate requests and only prevailed on one of the four claims that he litigated: the claim regarding the SOTP patient records. A reduction was appropriate given the fact that he only prevailed on less than half of his claims. The superior court did not abuse its discretion in making such a reduction.

Wallin argues that the superior court's decision was wrong[14] but he did not present any evidence that he incurred a higher amount of costs related to the claims upon which he prevailed. Although he suggests that the issue he prevailed upon was the "bigger" issue, he makes only conclusory assertions about the costs incurred related to that claim. Given the absence

[14] Wallin's arguments appear to be premised on the idea that the decision is reviewed *de novo*. However, as discussed above, the correct standard of review with respect to the appropriate amount of costs is abuse of discretion. *Sanders v. State*, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010). Appellate courts review the question of whether a statute permits the award of costs de novo, *Gander v. Yeager*, 167 Wn. App. 638, 646-47, 282 P.3d 1100 (2012). However, the amount of costs—the issue in this appeal—is reviewed for abuse of discretion.

of evidence showing which expenses were related to which claims, the superior court did not abuse its discretion.

Wallin also asserts that the superior court committed a legal error because it reduced his costs "without any evidence of inflation, fraud[,] or other malfeasance." Resp. Br., at 37. Wallin suggests that such a finding is a requirement of any reduction in costs in a PRA case based on *Mitchell v. Wash. State Institute of Public Policy*, 153 Wn. App. 803, 829, 225 P.3d 280 (2009). This argument misreads *Mitchell*. In *Mitchell*, the Court concluded that the fraud perpetuated by the plaintiff was a sufficient basis to reduce costs in that case. *Mitchell*, 153 Wn. App. at 829-30. The court did not state that fraud was necessary for a court to reduce the costs requested by a party. Rather, courts have discretion to reduce costs unrelated to a claim upon which the party prevailed. *See Sanders v. State*, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010).

Wallin suggests that he was penalized for bringing multiple claims regarding multiple requests in the same lawsuit.

He argues that the service of process and filing fees would have been the same if he brought one claim or four claims in his lawsuit and that he is being penalized for brining multiple claims in one suit. Resp. Br., at 37. Apparently, Wallin is suggesting that the reduction in costs puts him in a worse position than if he had filed two separate lawsuits. But if Wallin had filed two lawsuits rather than litigating two unrelated requests together, he would have been required to pay two filing fees. The Department would have prevailed in the case involving the request that Wallin is no longer challenging. Consequently, he would not be entitled to any costs in that lawsuit and the Department, as the prevailing party, would have been entitled to costs. In other words, filing two lawsuits would not have put him in a better position, given his failure to prevail on his claims related to the second request.

Instead, Wallin chose to include various claims in one lawsuit; he was only successful on twenty-five percent of those claims. Any award of costs should reflect this reality. To conclude otherwise would be to incentivize public records

requesters to include as many requests as possible in a single lawsuit in the hope that prevailing on one issue will entitle them to "all costs." That conclusion is contrary to existing case law, such as *Sanders*, and common sense. Therefore, the superior court did not abuse its discretion in reducing Wallin's costs.

2. The Superior Court Did Not Abuse Its Discretion in Rejecting Wallin's Attempt to Circumvent Statutory Deductions

A trial court does not abuse its discretion by requiring costs to be paid into an incarcerated individual's trust account. *Mitchell v. Wash. State Institute of Public Policy*, 153 Wn. App. 803, 830-32, 225 P.3d 280 (2009). Under RCW 72.09.480(3), certain deductions are taken "[w]hen an inmate[15]…receives any funds from a settlement or an award resulting from a legal action." In *Mitchell*, this Court rejected an incarcerated

[15] The provision incorporates the deductions in RCW 72.09.111 and the priorities in chapter 72.11 RCW as well as exempts inmates serving life without parole from certain deductions. Because the precise types and percentages of deductions are irrelevant to the arguments before the Court, the Department does not discuss those deductions, as applied to Wallin, in detail in this brief.

individual's argument that the superior court erred in refusing to honor his assignment of judgment. *Mitchell*, 153 Wn. App. at 830. The Court noted that, although there was little authority on the assignment of judgments, "courts cannot facilitate illegal activity." *Id.* at 831. This Court concluded that "[b]ecause the legislature has expressly provided that inmate's funds are subject to DOC administered deductions, the trial court properly restricted Mitchell's attempt to circumvent chapter 72.11." *Mitchell*, 153 Wn. App. at 832.

Like the superior court in *Mitchell*, the superior court in this case properly rejected Wallin's attempt to circumvent the deductions process enacted by the Legislature. Indeed, Wallin appears to concede that he was asking for the money to be paid in this manner so that he could circumvent the deduction scheme. Resp. Br., at 38 (arguing that he should have been permitted to put the money in his personal account to avoid deductions). The superior court appropriately rejected this attempt.

Wallin also argues that the funds used for his lawsuit came from his personal bank account and should be paid to his "attorney-in-fact." He cites no actual evidence to support his claim that the money came from his personal account. Regardless, it would not change the outcome. The Legislature has provided that inmate funds, including funds from settlements, are subject to deductions. There is no exception for lawsuits funded from an inmate's personal account.[16]

Wallin also suggests that he is permitted to send the money to whomever he wants, including his "attorney-in-fact." This argument, however, is undermined by *Mitchell*. Wallin cites no authority that an opposing party must pay an award of costs to a

[16] Wallin also complains that the Department gets the money through its policy and that the money is his money, not the Department's money. But the Department's policy simply implements the statutory provisions enacted by the Legislature and a substantial portion of deductions go to things like the victim's compensation fund. *See* RCW 72.09.111(1)(a).

person's "attorney-in-fact."[17] *See Kanam v. Kmet*, 21 Wn. App. 2d 902, 911, 508 P.3d 1071 (2022) (stating general rule that when a party fails to cite authority, court will assume there is none). Therefore, the trial court did not abuse its discretion when it reduced his costs and required the costs to be paid into his trust account.

H. Wallin Is Not Entitled to Costs on Appeal

The PRA provides for costs and attorney's fees to the prevailing party. RCW 42.56.550(4); *Sanders v. State*, 169 Wn.2d 827, 865, 240 P.3d 120 (2010). Because this Court should reverse and remand for dismissal of Wallin's claims, the Department would be the prevailing party and would be entitled to costs.[18] Wallin is not the prevailing party on appeal. Even if this Court were to wholly affirm the trial court's decision by rejecting both parties' appeals, Wallin would not be the

[17] Although Wallin's reference to "attorney-in-fact" is vague, the person Wallin identified is not a licensed attorney but is apparently a family member.

[18] If determined to be the prevailing party, the Department will file a cost bill in accordance with RAP 14.4.

prevailing party for purposes of costs because both parties would have prevailed on major issues. *City of Lakewood v. Koenig*, 160 Wn. App. 883, 896-97, 250 P.3d 113 (2011); *Smith v. Okanogan Cnty.*, 100 Wn. App. 7, 24, 994 P.2d 857 (2000).

Finally, even if the Court determines that Wallin is entitled to costs as the prevailing party, the Court should decline Wallin's invitation to require the Department to pay the costs to his "attorney-in-fact." Such a requirement would circumvent the statutory provisions related to the funds of incarcerated individuals. *Mitchell*, 153 Wn. App. at 832. Like the superior court, this Court should not entertain Wallin's attempts to circumvent the statutory deduction scheme.

IV. CONCLUSION

For the above reasons and those stated in the Department's opening brief, the Court should reverse the superior court's ruling that the Department violated the PRA and remand for dismissal of Wallin's claims. In the alternative, the Court should

affirm the superior court's decision to deny Wallin penalties and award Wallin only a portion of his costs.

V. CERTIFICATION

This document contains 10,621 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 28th day of November, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing DEPARTMENT'S REPLY BRIEF AND RESPONSE TO CROSS APPEAL to be filed with the Clerk of the Court, and I certify that I served all parties, or their counsel of record, a true and correct copy of this document by United States Mail, postage prepaid, at the following addresses:

JAMIE WALLIN, DOC #729164
WASHINGTON STATE PENITENTIARY
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I certify under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of November, 2022, at Olympia, Washington.

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